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No. 97-5737

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Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1997

SANDRA K. FORNEY,

Petitioner,

vs.

KENNETH S. APFEL, Commissioner of Social Security,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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QUESTION PRESENTED FOR REVIEW

The question presented is whether a district court judgment, which reverses a final decision of the Commissioner of Social Security with a remand for a rehearing, pursuant to the fourth sentence of 42 U.S.C. § 405(g), is immediately appealable by the Social Security claimant who, despite being a "prevailing party," nevertheless is aggrieved by that judgment in that she sought broader relief than the district court awarded?

STATEMENT REGARDING SUPREME COURT RULE 24(b)

All parties to the proceeding in the court whose judgment is under review (*i.e.*, the United States Court of Appeals for the Ninth Circuit) are listed in the caption of this case. However, President Clinton appointed Kenneth S. Apfel to serve as commissioner of the Social Security Administration, to succeed Shirley S. Chater. Therefore, pursuant to Rule 43(c) of the Federal Rules of Appellate Procedure and Supreme Court Rule 35.3, Kenneth S. Apfel is substituted for Shirley S. Chater as defendant in this suit. No further action need be taken to continue this suit by reason of the last sentence of section 42 U.S.C. § 405(g).

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The agency's unpublished final decision, an April 18, 1994 administrative law judge (ALJ) decision, appears at pages 7-33 of the Joint Appendix.[1]

The district court's unpublished OPINION AND ORDER entered May 2, 1995, and its unpublished JUDGMENT entered May 25, 1995, appear at pages 118-28 and 129, respectively, of the Joint Appendix. The Ninth Circuit's OPINION, filed March 4, 1997 (see Joint Appendix pages 131-44), is published as *Forney v. Chater*, 108 F.3d 228 (9th Cir. 1997). This Court granted Petitioner's Petition for a Writ of Certiorari, on January 16, 1998. (Joint Appendix at 145.)

GROUNDS FOR JURISDICTION

The published OPINION of the U.S. Court of Appeals for the Ninth Circuit was entered March 4, 1997. (Joint Appendix at 131.) Petitioner's petition for rehearing was denied by Order filed May 29, 1997. The Petition for a Writ of Certiorari was filed within 90 days of the denial of the petition for rehearing and was timely under Supreme Court Rules 13.3, 29.2, and 30.1.

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[1] In accordance with 20 C.F.R. § 404.981 (1997), the ALJ's decision became the agency's final order when the Appeals Council of the Social Security Administration declined to review the ALJ's decision.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED IN THIS CASE

The following statutes, 28 U.S.C. § 1291, and 42 U.S.C. § 405(g) are at issue in the instant appeal:

42 U.S.C. § 405(g) Judicial review.

[1] Any individual, after any final decision of the Commissioner of Social Security made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Commissioner of Social Security may allow. [2] Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the United States District Court for the District of Columbia. [3] As part of the Commissioner's answer the Commissioner of Social Security shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based. [4] **The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a**

rehearing. [5] The findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive, and where a claim has been denied by the Commissioner of Social Security or a decision is rendered under subsection (b) hereof which is adverse to an individual who was a party to the hearing before the Commissioner of Social Security, because of failure of the claimant or such individual to submit proof in conformity with any regulation prescribed under subsection (a) hereof, the court shall review only the question of conformity with such regulations and the validity of such regulations. [6] The court may, on motion of the Commissioner of Social Security made for good cause shown before the Commissioner files the Commissioner's answer, remand the case to the Commissioner of Social Security for further action by the Commissioner of Social Security, and it may at any time order additional evidence to be taken before the Commissioner of Social Security, but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding; and the Commissioner of Social Security shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm the Commissioner's findings of fact or the Commissioner's decision, or both, and shall file with the court any such additional and modified findings of fact and decision, and a transcript of the additional record and testimony upon which the Commissioner's action in modifying or affirming was based. [7] Such additional or modified findings of fact and decision shall be reviewable

> only to the extent provided for review of the original findings of fact and decision. [8] **The judgment of the court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions.** [9] Any action instituted in accordance with this subsection shall survive notwithstanding any change in the person occupying the office of Commissioner of Social Security or any vacancy in such office.

42 U.S.C. § 405(g) (bold emphases and bracketed numbering added).

> **28 U.S.C. § 1291. Final decisions of district courts.**
>
> **The courts of appeals** (other than the United States Court of Appeals for the Federal Circuit) **shall have jurisdiction of appeals from all final decisions of the district courts of the United States**, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

28 U.S.C. § 1291 (bold emphases added).

STATEMENT OF THE CASE

Petitioner applied for Social Security disability insurance benefits, under Title II of the Social Security Act[2], 42 U.S.C. § 423, in 1991. Her application was denied and she requested a hearing. An administrative law judge held a hearing and denied benefits. The ALJ's decision was reviewed by the Appeals Council, which remanded the matter to the ALJ for a second hearing.

Following the second hearing, the ALJ denied Petitioner's claim on the grounds that, although she was unable to perform her past relevant work, Petitioner was able to perform other jobs which existed in significant numbers in the national economy (Joint Appendix at 26-27.) The ALJ reached the foregoing determination first by rejecting the opinion of Petitioner's treating physician, second by rejecting the credibility of Petitioner's own testimony, and finally by drawing conclusions from the testimony of a vocational expert to whom the ALJ posed certain vocational hypothetical questions (Joint Appendix at 12-27.)

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[2] The district court erroneously states that Petitioner seeks "supplemental security income benefits (SSI) under the Social Security Act." (Joint Appendix at 119.) In fact, Petitioner's application was for disability *insurance* benefits under Title II of the Social Security Act – not for SSI benefits under Title XVI of the Social Security Act. *See* Joint Appendix at 11 and 28, whereat the ALJ correctly notes this fact. However, even the ALJ cites SSI regulations in error. (Joint Appendix at 12 and 20.) (Regulations beginning in "416" are SSI regulations.) The same legal standard of judicial review applies to both types of claims, however. *See* 42 U.S.C. § 1383(c)(3), which incorporates § 405(g) by reference, for SSI claims.

The Appeals Council declined to review the ALJ's decision. Petitioner then sought review in the district court, pursuant to 42 U.S.C. § 405(g).[3] She contended, inter alia, that the ALJ had rejected the treating physician's opinion supporting disability by applying incorrect legal standards (Joint Appendix at 73-77); the ALJ had rejected Petitioner's own testimony, and that of her lay witness, by incorrect legal standards (Joint Appendix at 77-86); the ALJ had failed to include all of Petitioner's limitations in the vocational hypothetical (Joint Appendix at 87-88); and the vocational expert's identification of other jobs Petitioner could perform was erroneous, conflicted with the Commissioner's own vocational resources, and was not supported by substantial evidence.[4] (Joint Appendix at 88-92.)

The district court ruled on four of the issues Petitioner had raised. First, it held that the ALJ did not err in rejecting the opinion of Petitioner's treating physician. (Joint Appendix at 126.) Second, the district court affirmed the ALJ's rejection of Petitioner's credibility. (Joint Appendix at 126-27.) Third, the district court affirmed the ALJ's exclusion from the vocational hypothetical questions limitations established by the treating

[3] Section 405(g) governs benefits other than disability insurance benefits and SSI. However, for the sake of simplicity, we will not refer to those benefits (which are not at issue herein).

[4] Petitioner sought an outright reversal of the agency's denial of disability benefits and an affirmative determination that she was entitled to those benefits; only as an alternative and lesser remedy did she seek a remand for further administrative proceedings on the merits of her claim.

physician and by Petitioner's testimony. (Joint Appendix at 127.)

Finally, however, the district court agreed with Petitioner that the ALJ's finding Petitioner able to perform other jobs was not supported by substantial evidence. (Joint Appendix at 127-28.) Because "the Secretary ha[d] not sustained her burden of showing that claimant can engage in substantial gainful work in the economy," the district court remanded the case, pursuant to sentence four of 42 U.S.C. § 405(g), "for further proceedings in accordance with [the district court's] opinion." (Joint Appendix at 128.)

Petitioner appealed the district court's judgment to the United States Court of Appeals for the Ninth Circuit because Petitioner had proven that she was entitled to disability insurance benefits as a matter of law.[5] (Pet. C.A. Brief at 18 and 35.)

[5] In *Gilliland v. Heckler*, 786 F.2d 178 (3d Cir. 1986), the court cited the established rule that the circuit courts, like the district courts, have the power to remand for payment of benefits. *Id.* at 184.

In the Ninth Circuit, the appellate court has exercised its power to remand for payment of benefits in numerous cases. *See*, e.g., *Bilby v. Schweiker*, 762 F.2d 716 (9th Cir. 1985); *Fife v. Heckler*, 767 F.2d 1427 (9th Cir. 1985); *Lester v. Chater*, 81 F.3d 821 (9th Cir. 1995); *Pitzer v. Sullivan*, 908 F.2d 502 (9th Cir. 1990); *Ramirez v. Shalala*, 8 F.3d 1449 (9th Cir. 1993); *Sprague v. Bowen*, 812 F.2d 1226 (9th Cir. 1987); and *Varney v. Secretary of HHS*, 859 F.2d 1396 (9th Cir. 1988) (*Varney II*).

All circuits recognize that the courts have the power to reverse the agency's decisions and remand for payment of benefits pursuant to § 405(g) when remand for further proceedings would serve no purpose. *See*, for example, *Jenkins v. Sullivan*, 906 F.2d 107, 109 (4th Cir. 1990); *Rivera v. Sullivan*, 923

The ALJ decided Petitioner's claim at step five of the sequential analysis where the Commissioner has the burden of production of evidence. *See Heckler v. Campbell*, 461 U.S. 458 (1983); and 20 C.F.R. § 404.1520(f). The ALJ relied on vocational expert testimony to provide evidence of the existence of jobs The vocational expert identified two occupations as described in the *Dictionary of Occupational Titles*[6] That Petitioner purportedly could perform given her vocational profile and residual functional capacity – the occupations of food and beverage order clerk and telephone answering service operator. (*See* Joint Appendix at 25.) However, the district court agreed with Petitioner that Petitioner could not perform those occupations given her residual functional capacity. The district court concluded that the Commissioner had not met his burden of "proof" at step five of the sequential analysis. (Joint Appendix at 128.)

Because the Commissioner had not satisfied his burden of production, the district court should have entered judgment reversing the Commissioner's final decision

F.2d 964, 970 (2d Cir. 1991); and *Thompson v. Sullivan*, 957 F.2d 611, 614 (8th Cir. 1992).

This case involves only whether Petitioner may appeal, and does not require the Court to resolve any conflict or pseudo-conflict among the circuits with respect to the exact *standard* for reversing the agency's decision without remanding for additional proceedings. *Cf. United States v. Jose*, 117 S.Ct. 463, 465 (1996) ("We express no opinion on the merits of the underlying dispute. The matter, indeed, is one that implicates an intercircuit conflict.")

[6] Employment and Training Admin., U.S. Dep't of Labor, *Dictionary of Occupational Titles* (4th ed. rev. 1991).

without a remand for a rehearing, *i.e.*, the court should have entered judgment finding Petitioner disabled. Instead, the district court entered judgment to permit the agency an opportunity to provide additional evidence at step five even though the agency previously had proffered evidence about the availability of jobs given the precise assumptions the district court accepted as true. (Joint Appendix at 128.) In other words, the district court accorded the Commissioner, without explicit rationale or justification, another 'bite at the apple' when the agency record already was fully developed with respect to the relevant issues, and Petitioner's entitlement to benefits was clear.

By published OPINION filed March 4, 1997[7] the Ninth Circuit Court of Appeals dismissed Petitioner's appeal, holding as follows:

> Forney prevailed in district court by securing a remand to the Secretary pursuant to sentence four of 42 U.S.C. § 405(g). The remand order terminated her civil action favorably to her, and she is the prevailing party. **As a prevailing party, she cannot appeal the remand order.** Accordingly, Forney's appeal is DISMISSED.

Forney, 108 F.3d at 234 (Joint Appendix at 144) (bold emphasis added).

By unpublished Order filed May 29, 1997, the Ninth Circuit also denied Petitioner's petition for rehearing.

[7] *See Forney v. Chater*, 108 F.3d 228 (9th Cir. 1997).

SUMMARY OF ARGUMENT

42 U.S.C. § 405(g) empowers a federal court to grant Social Security claimants various degrees of relief, *including* outright reversal of the agency's decision and remand for payment of benefits. In the district court, Petitioner sought, inter alia, outright reversal of the agency's decision and remand for payment of benefits. (*See* Joint Appendix at 92-93.) Petitioner was aggrieved by the district court's judgment, in that it granted her less than all the relief she sought. Holdings favorable to Petitioner on any one of the district court's three adverse rulings would have conferred broader relief than that granted by the district court.

Petitioner has the right to appeal in an effort to obtain broader relief than that granted by the district court. Her right derives from the express language of the fourth sentence of 42 U.S.C. § 405(g):

> The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing.

Describing the *appealability* of a final judgment entered pursuant to the fourth sentence of 42 U.S.C. § 405(g), the eighth sentence of 42 U.S.C. § 405(g) provides:

> The judgment of the court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions.

"[I]n other civil actions," aggrieved parties who obtain final judgments granting less than all the relief sought normally have the right to appeal rulings on issues decided adversely to them, in attempts to obtain broader relief. Further, because Petitioner was aggrieved by the district court's three adverse rulings, Petitioner has the right to appeal the district court's judgment.

ARGUMENT

28 U.S.C. § 1291 CONFERS JURISDICTION ON THE APPELLATE COURTS TO REVIEW ALL FINAL DECISIONS OF THE DISTRICT COURTS[8]

28 U.S.C. § 1291 provides, in relevant part: "The courts of appeals . . . shall have jurisdiction of appeals from *all* final decisions of the district courts of the United States. . . . " (Emphasis added.) In accordance with the plain language of this statute, the Ninth Circuit Court of Appeals had jurisdiction to decide the merits of Petitioner's appeal because Petitioner's district court judgment, entered in accordance with 42 U.S.C. § 405(g), is a final decision, and because Petitioner was aggrieved by the judgment.

[8] Except where a direct review may be had in the Supreme Court.

A JUDGMENT ENTERED PURSUANT TO THE FOURTH SENTENCE OF 42 U.S.C. § 405(g) IS A FINAL DECISION, SUBJECT TO APPEAL UNDER 28 U.S.C. § 1291

This case squarely presents an issue this Court acknowledged, but reserved, in *Sullivan v. Finkelstein*, 496 U.S. 617 (1990). To appreciate this, we first discuss *Melkonyan v. Sullivan*, 501 U.S. 89 (1991), where this Court construed *Finkelstein* as identifying two kinds of remands under 42 U.S.C. § 405(g): "(1) remands pursuant to the fourth sentence, and (2) remands pursuant to the sixth sentence." *Melkonyan*, 501 U.S. at 98 (citing *Finkelstein*, 496 U.S. at 623-629). Given "Congress' explicit delineation in § 405(g) regarding the circumstances under which remands are authorized," the Court held that "these were the *only* kinds of remands permitted under the statute." *Melkonyan*, 501 U.S. at 99-100.

Sentence four of 42 U.S.C. § 405(g) provides that the district court "shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing." Under the text and structure of § 405(g), therefore, sentence-four remand orders are *ancillary to*, and "must [ ] accompany a final judgment affirming, modifying, or reversing the administrative decision in accordance with sentence four." *Melkonyan*, 501 U.S. at 101. Moreover, the eighth sentence of § 405(g) provides that the sentence-four judgment "shall be *final* except that it shall be subject to review in the same manner as a judgment in other civil actions." (Emphasis added.)

In *Finkelstein*, this Court recognized that in the fourth sentence of § 405(g), Congress had defined a class of orders as "final judgments" that "by inference would be appealable under § 1291." *Finkelstein*, 496 U.S. at 628. Accordingly, based on the express language of the statute, this Court held in *Finkelstein* that a district court's judgment entered pursuant to sentence four is a "final judgment" and may be appealed pursuant to § 1291 even though it is accompanied by a remand to the agency for further proceedings. *Finkelstein*, 496 U.S. at 625, 629.

As the Court further explained in *Finkelstein*, and as the Court reiterated in *Shalala v. Schaefer*, 509 U.S. 292 (1993):

> Under § 405(g), "each final decision of the Secretary [is] reviewable by a separate piece of litigation," and a sentence-four remand order "*terminate[s]* the civil action" seeking judicial review of the Secretary's final decision. 496 U.S., at 624-625 (emphases added [by the *Schaefer* Court]).

Schaefer, 509 U.S. at 299. Accordingly, any decision of the Commissioner upon remand will be subject to judicial review in a "separate piece of litigation," *i.e.*, a new civil action.[9] *Finkelstein*, 496 U.S. at 625. The *Finkelstein* Court thus held that the government could appeal a sentence four reversal/remand for rehearing, but the court

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[9] *See, e.g., Frizzell v. Sullivan*, 937 F.2d 254, 255-57 (5th Cir. 1991), where the Fifth Circuit construed *Finkelstein* as requiring the claimant to institute a new civil action to obtain judicial review of the agency's final decision following a sentence four remand.

expressly reserved the issue of whether or not a claimant could do so. *Finkelstein*, 496 U.S. at 623 n.3.

After finding that the agency's decision denying Petitioner's claim for benefits was not supported by substantial evidence, the district court entered a judgment remanding for additional proceedings. (Joint Appendix at 128-29.) The parties and the U.S. Court of Appeals for the Ninth Circuit all agree that the district court's judgment was entered pursuant to sentence four of 42 U.S.C. § 405(g).[10] *Forney*, 108 F.3d at 230 & 231 n.1; Joint Appendix at 133 & 137 n.1; and Brief For The Respondent upon Petition for a Writ of Certiorari herein, at 3.

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[10] Although not at issue herein, a district court also has the power, in limited circumstances, to remand a case to the Commissioner pursuant to sentence six of 42 U.S.C. § 405(g). The first clause of sentence six empowers the court, on motion of the Commissioner, made for good cause shown before he files his answer to the complaint, to remand the case to the Commissioner for further action. Additionally, the court may, at any time, order that additional evidence be taken before the Commissioner, but only upon a showing that there is new and material evidence and that there is good cause for the failure to incorporate the evidence in the record in the prior administrative proceedings.

Unlike a sentence-four remand, a sentence-six remand does not terminate the civil action challenging the Commissioner's decision denying benefits. The district court therefore retains jurisdiction during the administrative proceedings on remand. Accordingly, the second clause of sentence six requires the Commissioner to file with the court any "additional and modified findings of fact and decision, and a transcript of the additional record and testimony upon which the Commissioner's action in modifying or affirming was based," so that the district court may then enter its *final* sentence-*four* judgment in the case. *See Finkelstein*, 496 U.S. at 627-28.

In direct reliance on this Court's holding in *Finkelstein*, the Ninth Circuit correctly held that the sentence-four remand judgment herein is "final" with respect to "all parties. . . . " *Forney*, 108 F.3d at 232. (Joint Appendix at 139.) That is, the judgment was not merely interlocutory, and it "*terminate[d]* the civil action." *Id.* (citing *Sullivan v. Finkelstein*, 496 U.S. 617 (1990) (emphasis added.))

Without phrasing its discussion in terms of jurisdiction, the Ninth Circuit implicitly questioned its jurisdiction under § 1291. In addition, the Ninth Circuit held that Petitioner did not have the right immediately to appeal the adverse findings contained in the district court's *final judgment* and to seek on appeal the relief denied by the district court, because Petitioner was "a prevailing party." *Forney*, 108 F.3d at 232-34. (Joint Appendix at 139-44.)

IN THE FOURTH SENTENCE OF 42 U.S.C. § 405(g), CONGRESS GRANTED BROAD JUDICIAL AUTHORITY

Inasmuch as it is established that judgments entered pursuant to sentence four are appealable, and that 28 U.S.C. § 1291 confers upon the appellate court jurisdiction to hear an appeal, it remains only to determine whether **Petitioner** may appeal the district court's judgment herein.[11] As an aggrieved party, Petitioner submits

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[11] As stated above, in *Sullivan v. Finkelstein*, 496 U.S. 617 (1990), this Court expressly held that the *agency* could appeal from a sentence four judgment which aggrieved the agency. *Finkelstein*, 496 U.S. at 628-29. The Court reserved the issue of whether or not an aggrieved *claimant* could do so. *Id.* 496 U.S. at 623, n.3.

she may appeal. Petitioner is an aggrieved party because the district court granted her less relief than that to which she was legally entitled (including, among other things, an outright award of benefits). Sentence four of § 405(g) states:

> The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing.

Sentence four thus authorizes federal courts to grant varying degrees of relief. Such relief may take at least the following forms:

- No relief – the court affirms the agency's decision;
- Partial relief – the court enters judgment reversing the agency's final decision and remanding for a rehearing; and
- Full relief – the court enters judgment reversing the agency's decision and remands for calculation of benefits (*i.e.*, "without remanding the cause for a rehearing").

Contrasting the judicial grant of authority in § 405(g) with the grant of authority under the Administrative Procedure Act, this Court, in *Sullivan v. Hudson*, 490 U.S. 877 (1989), noted as follows:

> As provisions for judicial review of agency action go, § 405(g) is somewhat unusual. The detailed provisions for the transfer of proceedings from the courts to the Secretary and for the filing of the Secretary's subsequent findings

with the court suggest a degree of direct interaction between a federal court and an administrative agency alien to traditional review of agency action under the Administrative Procedure Act. As one source puts it:

> "The remand power places the courts, not in their accustomed role as external overseers of the administrative process, making sure that it stays within legal bounds, but virtually as coparticipants in the process, exercising ground-level discretion of the same order as that exercised by ALJs and the Appeals Council when they act upon a request to reopen a decision on the basis of new and material evidence." J. Mashaw, C. Goetz, F. Goodman, W. Schwartz, P. Verkuil, & M. Carrow, Social Security Hearings and Appeals 133 (1978).

Hudson, 490 U.S. at 895.

THE RIGHT TO APPEAL TURNS NOT ON WHICH PARTY PREVAILS, BUT ON WHICH PARTY WAS (OR PARTIES WERE) *AGGRIEVED*

Although the Ninth Circuit held that, *as the prevailing party*, Petitioner could not appeal, *Forney*, 108 F.3d at 234 (Joint Appendix at 144), this Court has expressly held "that appellate jurisdiction over final decisions does not turn on which side prevailed in the District Court." *Jose*, 117 S.Ct. 463, 465 (1996). In *Jose*, this Court expressly recognized that once it is established that appellate jurisdiction lies, the appellate court may hear an appeal by a party who was aggrieved by the district court's order, even though that party may have prevailed *in part* before

the district court (as Petitioner did in proceedings herein). *Jose,* 117 S.Ct. at 465.

An order that "ends the litigation on the merits" may be appealed by the party or parties aggrieved, pursuant to 28 U.S.C. § 1291. *See* 20 *Moore's Federal Practice* § 303.10 [2] [a] (3d ed. 1997). While a party "who receives *all* that he has sought generally is not aggrieved by the judgment affording the relief and cannot appeal from it," *Deposit Guaranty National Bank v. Roper,* 445 U.S. 326, 333 (1980) (emphasis added), Petitioner did not receive *all* the relief she sought.

When a Social Security disability insurance benefits claimant files a court action, seeking reversal of the agency's decision "*without* remanding the cause for a rehearing," *see* 42 U.S.C. § 405(g), sentence four, the claimant is aggrieved by a court's judgment which fails to reverse the agency's decision and order an award of benefits. The claimant may also be aggrieved by specific holdings of the district court, such as the district court's holdings hereinbelow (*see* Joint Appendix at 125-27), that the ALJ properly found Petitioner's complaints not credible and discounted the report of the treating physician.

It is manifest that Petitioner was aggrieved by the district court's judgment.[12] Accordingly, she may appeal. "[A] party aggrieved by a judgment or order of a district

[12] See also Brief For The Respondent upon Petition for a Writ of Certiorari, herein, at page 9, conceding not only that Petitioner was aggrieved, but that she was "sufficiently aggrieved" to be entitled to appellate review.

court may exercise the statutory right to appeal therefrom." *Deposit Guaranty National Bank v. Roper,* 445 U.S. 326, 333 (1980). As the Solicitor General acknowledges (Brief For The Respondent upon Petition for a Writ of Certiorari, at 9, n.5), the issue is *not* whether the party "prevailed" in the district court (as the Ninth Circuit held), but whether the party is "aggrieved" by that court's judgment.[13]

Nothing in § 405(g) *requires* the claimant to accept the burden of a remand (as the Ninth Circuit would require) before obtaining appellate review on *dispositive* legal issues. To the contrary, the fourth and eighth sentences of § 405(g) expressly contemplate that the parties may take an immediate appeal from adverse holdings contained in a district court's final decision, even though the court entered judgment reversing the Commissioner's final decision and remanded the cause to the agency for a rehearing.

AN APPEAL AT THIS STAGE OF THE PROCEEDINGS WILL NOT BE A "PIECEMEAL" APPEAL

Although acknowledging that Petitioner, as a "prevailing party" for purposes of an attorney fee award, was

[13] Although the Ninth Circuit recognized that "the status of prevailing party for purposes of attorney's fees under 28 U.S.C. § 2412(d)(1)(B) does not automatically equate with status as prevailing part for purposes of appeal," *Forney,* 108 F.3d at 232 (Joint Appendix at 140), the appellate court held that "[t]here are compelling reasons . . . for declining to permit a claimant in Forney's position from appealing the remand order." *Id.*

not *necessarily* a "prevailing party for purposes of appeal,"[14] the Ninth Circuit declined to hear Petitioner's appeal, for "the same reasons that underlay the long-established general rule that a remand to an administrative agency was not appealable. . . . " *Forney*, 108 F.3d at 232. (Joint Appendix at 140.)

In determining that Petitioner may not appeal her sentence-four judgment, the Ninth Circuit failed adequately to distinguish between remand *judgments* which *terminate the civil action* and remand *orders* which are merely interlocutory.

In *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962), this Court noted that indicia of finality, for purposes of conferring jurisdiction upon a court to exercise immediate appellate review, are: 1) the district court "disposed of the entire complaint"; and 2) "Every prayer for relief was passed upon." *Id.* at 308. This further supports that Petitioner's sentence-four judgment is final and immediately appealable, because her sentence-four judgment disposed of the entire complaint, passed upon every prayer for relief, *and terminated the civil action. See Finkelstein*, 496 U.S. at 625.

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[14] In *Shalala v. Schaefer*, 509 U.S. 292 (1993), this Court noted that "prevailing party" status for fee award purposes has been obtained "[i]f the plaintiff has succeeded on *any* significant issue in litigation which achieve[d] some of the benefit . . . sought in bringing suit." *Schaefer*, 509 U.S. at 302 (emphasis added). Thus, the Ninth Circuit is correct that "prevailing party" status for purposes of a fee award does not equate with "prevailing party" status for purposes of appeal.

At odds with this Court's holding in *Brown Shoe Co.*, the Ninth Circuit provided the following rationale for declining to allow Petitioner immediately to appeal the district court's adverse rulings:

> There are compelling reasons, however, for declining to permit a claimant in Forney's position from appealing the remand order she succeeded in obtaining. They are the same reasons that underlay the long-established general rule that a remand to an administrative agency was not appealable, with an exception only for the Secretary who might be precluded from post-remand access to the court. *See, e.g., Perales v. Sullivan*, 948 F.2d 1348, 1353 (2d Cir. 1991); *Travelstead v. Derwinski*, 978 F.2d 1244, 1247 (Fed. Cir. 1992). Forney may, on remand, secure all of the relief she seeks. If she does, our decision on the merits of this appeal will have been wholly unnecessary. Review at this point would be subject to all of the disadvantages of piecemeal appeals; unnecessary decisions waste judicial effort, interfere unduly with the district courts or administrative agencies, and require us to adjudicate on less than a full record. *See Travelstead*, 978 F.2d at 1247. All of these considerations lead us to conclude that we ought not to entertain Forney's present appeal.[6]
>
> [Footnote 6:] We do not follow, therefore, the example of the Tenth Circuit in *Nguyen v. Shalala*, 43 F.3d 1400 (10th Cir. 1994). There the court of appeals permitted a claimant to appeal a sentence-four remand order, stating in a footnote that such remand orders were "final and appealable" under *Finkelstein*. *Id.* at 1402 n. 2. We have

> found no other published decision permitting appeal of such a remand order by a claimant. The outcome of the claimant's appeal was most unusual; the remand order, which had been invited by the Secretary, was held to be improper and the Secretary's denial of benefits was ordered reinstated. *Id.* at 1403-04. Thus the only party that appealed, the claimant, was left worse off for having appealed. We conclude that this scenario is unlikely to be repeated, and that appeal of a remand order by a claimant normally will leave further-administrative proceedings to follow regardless of the outcome of the appeal. For that reason, judicial economy militates against permitting the prevailing claimant to appeal.

Forney, 108 F.2d at 232-33. (Joint Appendix at 140-41.)

The Ninth Circuit's rationale does not apply to Petitioner. Petitioner's appeal will not result in a "piecemeal" appeal, which "normally will leave further administrative proceedings to follow regardless of the outcome of the appeal." *Forney*, 108 F.3d 233 n.6. (Joint Appendix at 141 n.6.) Instead, if the appellate court addressed Petitioner's arguments on the merits and ruled for the Petitioner, the appellate court should order an award of benefits, terminating the controversy *and* the civil action.

The circumstances present in the instant case are thus unlike the situations discussed in *Travelstead v. Derwinski*, 978 F.2d 1244 (Fed. Cir. 1992), relied upon by the Ninth Circuit. The court in *Travelstead* recited the general rule that *interlocutory remand orders* are not appealable. *Id.* at 1247. *Travelstead* then cited *Cabot Corp. v. United States*,

788 F.2d 1539 (Fed. Cir. 1986), and noted that the *Cabot Corp.* analysis suggested that "appeals of such [remand] orders would vitiate the important interests served by the final judgment rule. [footnote omitted] We noted that this rule 'helps preserve the respect due trial judges by minimizing appellate-court interference. . . . ' " *Travelstead*, 978 F.2d at 1247 (bracketed comments added).

Here, the final judgment rule against appeals from interlocutory remand orders does not apply, because (unlike the interlocutory remand order discussed in *Travelstead*) Petitioner's sentence-four judgment (with remand) *is* a final judgment. Petitioner's final judgment *terminated the civil action*, and there is no danger of "appellate-court interference" with the district court's judicial autonomy. The district court proceedings are completed. The district court's decision herein "leaves nothing for the court to do but execute the judgment." *Catlin v. United States*, 324 U.S. 229, 233 (1945). Indeed, as this Court noted in *Finkelstein*, if Petitioner still is aggrieved after the completion of proceedings after a sentence-four remand, she can obtain judicial review *not* by initiating further review in the original civil action, but instead by filing a *new* complaint. *Finkelstein*, 496 U.S. at 625.

Because Petitioner will, if still aggrieved after the completion of remand proceedings, be required to initiate a *new* civil action, there is no danger of "expense and delays of repeated appeals in the *same* suit." *Travelstead*, 978 F.2d at 1247 (emphasis added).

Nor is an appeal herein contraindicated by a "preference for review of a fully-developed record in contrast to

determination of legal questions in the abstract." *Travelstead*, 978 F.2d at 1247. The record *is* fully developed as regards the issues Petitioner seeks to appeal, and if Petitioner prevails on those issues, not only should there be no further proceedings before the district court, there will be no remand proceedings before the agency. For all of these reasons, the Ninth Circuit's reliance on the factors recited in *Travelstead* is misplaced.

Moreover, the Ninth Circuit overlooked a critical point: *after* reciting the factors which generally counsel against the exercise of appellate jurisdiction in agency remand cases, the *Travelstead* court held that if the court's "order in this case 'reversing the decision of the [agency],' . . . '**terminated the [ ] action** challenging the Secretary's final determination,' then it is final and appealable under *Finkelstein*." *Travelstead*, 978 F.2d at 1248 (emphasis added). Setting forth a critical point which the Ninth Circuit neglected to acknowledge, the *Travelstead* court concluded, "The principal directive of *Finkelstein* is that remands are not all of the same nature. Some are final; some are not." *Travelstead*, 978 F.2d at 1249. Inherent in the court's observation is the court's conclusion that, although an immediate appeal might not be taken from remands which are not final, an appeal *may* be taken from remands which *are* final (such as the sentence-four judgment at issue herein). There is no question that Petitioner's sentence-four judgment terminated the civil action, and thus, in accordance with *Travelstead*, "it is final and *appealable* under *Finkelstein*." *Travelstead*, 978 F.2d at 1248.

In relying upon *Travelstead*, the Ninth Circuit misconstrued the entire body of law underpinning the rule

that interlocutory orders typically are not immediately appealable under § 1291. As this court held in *Moses H. Cone Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983), "a final decision for purposes of § 1291" is a decision that puts the would-be appellant "effectively out of court." *Moses H. Cone Hospital*, 460 U.S. at 10 & n.11. Here, Petitioner's sentence-four final judgment puts her "effectively out of court," because it *terminates* the civil action.

Summarizing the policy reasons behind the finality requirement of § 1291, this Court in *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368 (1981), stated as follows:

> We have consistently interpreted this language [of § 1291] as indicating that a party may not take an appeal under this section until there has been a "decision by the District Court that 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.' " *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467 (1978), quoting *Catlin v. United States*, 324 U.S. 229, 233 (1945). This rule, that a party must ordinarily raise all claims of error in a single appeal following final judgment on the merits, serves a number of important purposes. It emphasizes the deference that appellate courts owe to the trial judge as the individual initially called upon to decide the many questions of law and fact that occur in the course of a trial. Permitting piecemeal appeals would undermine the independence of the district judge, as well as the special role that individual plays in our judicial system. In addition, the rule is in accordance with the sensible policy of "avoid[ing] the

> obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment." *Cobbledick v. United States*, 309 U.S. 323, 325 (1940). *See DiBella v. United States*, 369 U.S. 121, 124 (1962).

Firestone Tire & Rubber, 368 U.S at 373-74.

Petitioner's assertion of right to appeal is consistent with all of the factors discussed in *Firestone Tire & Rubber*. First, the district court's *final judgment* hereinbelow leaves nothing for the district court to do but execute the judgment. Moreover, the rule that "a party must ordinarily raise all claims of error in a single appeal following *final judgment* on the merits" is consistent with Petitioner's assertion of right, because she *is* raising all of her claims "in a single appeal following *final judgment* on the merits." In a sentence-four remand case, there is no piecemeal appeal which would undermine the independence of the district judge, because entry of a sentence-four judgment *terminates* the district court proceedings. Finally, there is no possibility of "harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment." This is so because a sentence-four judgment is the *final* judgment in the district court proceedings, and any appeal therefrom will be taken in one consolidated proceeding.

The Ninth Circuit's reliance on *Perales v. Sullivan*, 948 F.2d 1348, 1353 (2d Cir. 1991) is also misguided. In *Perales*,

the court stated, "A district court's remand to an administrative agency . . . keeps a case alive and *hence* is ordinarily not appealable."[15] *Perales*, 948 F.2d at 1353 (emphasis added). As this Court held in *Finkelstein*, however, a judgment entered pursuant to sentence four of § 405(g) (whether or not accompanied by a remand order) does *not* "keep a case alive." Instead, this Court held, a sentence-four judgment *terminates* the civil action. *Finkelstein*, 496 U.S. at 625.

This Court's holding in *Flanagan v. United States*, 465 U.S. 259 (1984) eloquently demonstrates why the Ninth Circuit's citation to *Perales* (and the Ninth Circuit's rationale surrounding the issue of appealability) is inapposite. In *Flanagan*, this court stated as follows:

> [T]his Court has long held that the policy of Congress embodied in [§ 1291] is inimical to piecemeal appellate review of trial court decisions **which do not terminate the litigation**. . . . " *United States v. Hollywood Motor Car Co.*, 458 U.S. 263, 265 (1982).

Flanagan, 465 U.S. at 264 (emphasis added).

The entirety of the Ninth Circuit's discussion relies on policies developed to further the efficient and orderly review of "trial court decisions **which do not terminate the litigation.**" *Flanagan*, 465 U.S. at 264 (emphasis added). However, that rationale does not apply herein,

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[15] In *both* cases cited by the Ninth Circuit to support its decision, the courts ultimately held that there was jurisdiction to hear the appeals. *Travelstead*, 978 F.2d at 1249; *Perales*, 948 F.2d at 1353.

because the district court's judgment *terminated* the litigation.

The Ninth Circuit's rationale also fails to acknowledge that Petitioner seeks to appeal *not* from the remand order itself, but from the adverse rulings on issues upon which the district court *declined* to grant relief. The district court's adverse holdings on these issues are what are made "final" by the judgment entered pursuant to § 405(g).[16]

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[16] Petitioner appealed the district court's judgment not only because she did not receive a judgment reversing without a remand for a rehearing. She appealed for the additional reason that if she did not challenge several of the adverse holdings underlying the district court's judgment, her chances of success in further administrative proceedings on remand would be significantly diminished. For example, the district court upheld the ALJ's finding that Petitioner's allegations of back pain were "not credible." Under either the law of the case or issue preclusion, Petitioner could not establish during any renewed administrative proceedings that her allegations of back pain were credible (at least during the period adjudicated by the ALJ) unless, for example, she overcame with additional evidence the ALJ's prior adverse credibility finding. Because the extent of a claimant's limitations often is dispositive in disability adjudications even when vocational considerations are taken into account at step five of the sequential analysis, *see*, e.g., *Varney v. Secretary of HHS*, 859 F.2d 1396, 1399-1401 (9th Cir. 1988) (*Varney II*), it was in Petitioner's interest to challenge the district court's holding with respect to the ALJ's credibility finding. The Ninth Circuit, in dismissing Petitioner's claim, was insufficiently appreciative of the importance to Petitioner of the law of the case and issue preclusion.

THE CIRCUIT COURTS OF APPEALS HAVE ALLOWED CLAIMANTS IN PETITIONER'S POSITION TO APPEAL

The Ninth and Tenth Circuits have published opinions permitting immediate appeals, by "prevailing" (yet aggrieved) plaintiffs, of judgments of remand pursuant to sentence four of § 405(g).[17] *Atkins v. Shalala*, 837 F.Supp. 318 (D. Or. 1993), *as modified by Atkins v. Shalala*, 70 F.3d 529 (9th Cir. 1995);[18] and *Nguyen v. Shalala*, 43 F.3d 1400 (10th Cir. 1994). Because of the conflict between the published decision in *Atkins* and the published decision in *Forney*, the Ninth Circuit has an intra-circuit conflict, which the *Forney* court did not address.

In *Nguyen v. Shalala*, 43 F.3d 1400 (10th Cir. 1994), the Tenth Circuit expressly noted that the court *had* jurisdiction to hear the prevailing claimant's appeal. *See Nguyen*, 43 F.3d at 1402 n.2: "A reversal and remand ordered pursuant to the fourth sentence of 42 U.S.C. § 405(g), is

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[17] In the Petition for a Writ of Certiorari, at page 11, Petitioner cited *Richmond v. Chater*, 94 F.3d 263 (7th Cir. 1996), and asserted this case had permitted a claimant immediately to appeal from a sentence-four remand order. Upon further analysis, it appears that assertion was erroneous.

[18] In *Atkins*, without discussing jurisdiction, the court assumed jurisdiction to lie. Counsel is aware of the rule that the courts are "not bound by previous exercises of jurisdiction in cases in which [the courts'] power to act was not questioned but was passed *sub silentio*." *Brown Shoe Co. v. United States*, 370 U.S. 294, 307 (1962). However, the *Brown Shoe* Court also noted, "neither should we disregard the implications of an exercise of judicial authority assumed to be proper" for a number of years. *Id.*

final and appealable. *See Sullivan v. Finkelstein*, 496 U.S. 617 [. . .] (1990)."

Atkins and *Nguyen* are consistent with this court's holdings in *Finkelstein* and *Schaefer* that judgments entered pursuant to sentence four of § 405(g) are **appealable,** *even though* accompanied by a remand order. Those cases also are consistent with this Court's holding, in *United States v. Jose*, 117 S.Ct. 463, 465 (1996), that the *aggrieved* party or parties may appeal.

In *United States v. Jose*, 117 S.Ct. 463, 465 (1996), the Supreme Court noted that it previously had granted a writ involving a case similar to *Jose*, and "We hardly would have done so had we considered the matter unfit for review." *Id.* The Ninth and Tenth Circuits, when adjudicating the appeals in *Atkins* and *Nguyen*, "hardly would have done so had [the Ninth and Tenth Circuits] considered the matter[s] unfit for review." In holding that Petitioner could not appeal, the Ninth Circuit erred.

CONCLUSION

For the foregoing reasons, Petitioner respectfully prays that this Court reverse the decision of the United States Court of Appeals for the Ninth Circuit. This Court should hold that a Social Security disability claimant who obtains a district court judgment reversing a final decision of the Commissioner with a remand for rehearing pursuant to 42 U.S.C. § 405(g) has the right immediately to appeal adverse rulings, when the district court judgment aggrieves the claimant, and when greater relief

would be granted if the adverse rulings were to be resolved in the claimant's favor, upon appeal.

Petitioner's request for relief before this Court is limited to the issue of appealability, and she does not ask this Court to consider the merits of her underlying claim for disability insurance benefits.

Respectfully submitted,

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